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In The

Supreme Court of the United States

October Term, 1994

THE JOHN G. AND MARIE STELLA KENEDY MEMORIAL FOUNDATION,

Petitioner,

vs.

GARRY MAURO, COMMISSIONER OF THE GENERAL LAND OFFICE, AND THE STATE OF TEXAS,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

May a private party who owns real property under state law seek to vindicate its constitutionally protected property rights by way of an action under 42 U.S.C. § 1983 for prospective declaratory and injunctive relief against a state official who wrongfully occupies and controls the property under color of the state's claim of ownership?

LIST OF PARTIES

The parties to the proceeding in the Court of Appeals for the Fifth Circuit were Petitioner The John G. and Marie Stella Kenedy Memorial Foundation, and Respondents Garry Mauro (in his official capacity as Commissioner of the General Land Office of Texas) and the State of Texas.

This action was originally commenced by Petitioner in a state district court in Kenedy County, Texas. Respondents removed the action to the United States District Court for the Southern District of Texas, Corpus Christi Division. Petitioner and Respondents have been the only parties to this action since its inception.

Petitioner The John G. and Marie Stella Kenedy Memorial Foundation has no parent entities, subsidiaries, or affiliates to list pursuant to Rule 29.1.

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On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioner The John G. and Marie Stella Kenedy Memorial Foundation respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in the above-entitled proceeding on May 27, 1994.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit is reported at 21 F.3d 667, and is reproduced in the Appendix at p. A1.

The United States District Court for the Southern District of Texas (the Honorable H.W. Head, Jr., District Judge) wrote an opinion in issuing its Order of Dismissal, which was entered on October 1, 1992. This opinion was not published, and it is reproduced in the Appendix at p. B1.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on May 27, 1994. On June 29, 1994, the Fifth Circuit denied the petition for rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Const. amend. XI:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. amend. XIV, § 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United

States; *nor shall any state deprive any person of* life, liberty or *property without due process of law*; nor deny any person within its jurisdiction the equal protection of the laws. (Emphasis added).

42 U.S.C. § 1983:

Every person who, under color of any statute, ordinance, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress. For the purposes of this Section, any Act of Congress applicable exclusively to the District of Columbia shall be considered a statute of the District of Columbia.

STATEMENT OF THE CASE

This case raises the critical issue of whether a private party may use 42 U.S.C. § 1983 to vindicate its constitutionally protected rights in real property against a state official who is wrongfully occupying the property under color of the state's claim of ownership. For years, decisions by this Court have answered this question in the affirmative. Under the Court of Appeals' ruling in this case, however, a private owner may not seek prospective declaratory and injunctive relief against the official because, according to the Fifth Circuit, the state itself is the real party in interest if it has a colorable claim to the

property. According to the ruling of the District Court that the Fifth Circuit affirmed, the issue does not even present a federal question, because rights in real property are governed by state law.

The Fifth Circuit's decision, like the ruling of the District Court, holds that property rights may exist only at the pleasure of the state and its officers. The Fifth Circuit's opinion, like the holding of the District Court, could easily deny a private owner any avenue for redress. The Fifth Circuit's decision is so contrary to the jurisprudence of this Court and of other Circuits concerning the most fundamental rights that a writ of certiorari should issue.

Petitioner The John G. and Marie Stella Kenedy Memorial Foundation (the "Foundation") owns coastal property in south Texas that includes parts of original Spanish and Mexican land grants commonly known as the Barreta grants. The eastern boundary of the Barreta grants is the Laguna Madre, which lies between the Texas mainland and Padre Island. The shoreline of the Barreta grants extends for approximately 15 miles. (Appendix at p. B1).

Land submerged by the Laguna Madre belongs to Respondent the State of Texas (the "State"), and is administered by Respondent Garry Mauro ("Mauro") in his official capacity as Commissioner of the General Land Office. Fast land bordering the Laguna Madre belongs to littoral property owners. The boundary is defined by the present shoreline, which is subject to natural change.

The Foundation has substantial evidence that approximately 35,000 acres bordering the Laguna Madre

(the "Disputed Land") is now actually fast land and hence part of its property. The State, however, claims the Disputed Land as part of its submerged property. The Foundation's rights in the Disputed Land are at issue in this case. (Appendix at pp. B1-B3).

In 1984, the Foundation commissioned a survey of its property, including the Barreta grants. In 1986, the surveyors submitted a final report certifying that all of the Disputed Land lies above the level of mean higher high tide, which is the shoreline boundary. The Foundation shared these results with Mauro and other officials of the State. Respondents, however, refused to acknowledge the Foundation's claim of ownership, even though Respondents undertook no survey of their own.

The Foundation then attempted to obtain the consent of the Texas Legislature to bring a lawsuit to adjudicate the boundary. Mauro and other officials of the State repeatedly acknowledged that they had no data of their own by which to determine title to the Disputed Land, and that there was a substantial question as to where the boundary lay. Nonetheless, Respondents secured the defeat of consent resolutions that were introduced on the Foundation's behalf in the Texas Legislature in 1987 and 1989.

Thwarted at every turn, the Foundation brought suit against Respondents in January, 1990 in a state court in Kenedy County, where the Disputed Land is located. The Foundation asserted a claim for prospective declaratory and injunctive relief only against Mauro in his official capacity under 42 U.S.C. § 1983, maintaining that Mauro,

acting under color of state law, had deprived the Foundation of its property without due process of law. The Foundation also asserted various state law theories, including an inverse condemnation claim under the Texas Constitution. (Appendix at p. A2).

In February, 1990, Respondents removed the action to the United States District Court for the Southern District of Texas (the "District Court") on the basis of federal question jurisdiction. 28 U.S.C. §§ 1331, 1343, 1441. After removal, the Foundation amended its pleadings to assert a federal inverse condemnation claim under the Fifth and Fourteenth Amendments.

Respondents eventually moved for summary judgment on their affirmative defenses, including sovereign immunity under the Eleventh Amendment. The Foundation, in turn, moved for partial summary judgment on its claim that the Disputed Land is fast land.

In September, 1992, the District Court signed an Order of Dismissal. (Appendix at p. B1). The District Court determined that it had no jurisdiction over the Foundation's state law causes of action, and it dismissed them. (Appendix at pp. B4-B5). The District Court also determined that the Eleventh Amendment deprived it of jurisdiction over the Foundation's federal inverse condemnation claim, and it dismissed that action. (Appendix at p. B4). The District Court further held both that it lacked subject matter jurisdiction over the Foundation's § 1983 action against Mauro, and that the Foundation had failed to state a claim under that statute. According to the District Court, the Foundation's § 1983 claim actually alleged a violation of *state* law, not *federal* law, because the

ultimate question of rights in the Disputed Land turned on Texas property law. (Appendix at pp. B7-B15). Finally, the District Court denied the Foundation's motion for partial summary judgment. (Appendix at p. B5). After remembering that Respondents had removed the case, the District Court amended its Order of Dismissal in October, 1992, and remanded the state law claims to the Texas court. (Appendix at pp. B17-B19).

The Foundation appealed the dismissal of its § 1983 claim to the Fifth Circuit. While the federal appeal was pending, the Foundation reasserted its state law claims in the Texas court in Kenedy County. Respondents, however, secured the dismissal of those claims on sovereign immunity grounds. The Foundation appealed that dismissal, and the appeal is now pending before a state tribunal.

Moreover, while the appeal was pending before the Fifth Circuit, several of the State's oil and gas lessees whose leaseholds include portions of the Disputed Land commenced state law interpleader actions in a court in Travis County, Texas. Respondents and the Foundation were named as defendants. The Foundation cross-claimed against Respondents, asserting its rights to the Disputed Land. Respondents have not answered the cross-claim.

The Fifth Circuit requested post-submission briefing on these state court actions. Thus, the Fifth Circuit was well aware that there was no certainty that the Foundation would have any state forum for the adjudication of its claims, and that state law sovereign immunity might preclude the Foundation from seeking redress on any state law theory.

On May 27, 1994, the Fifth Circuit rendered its decision. The Court of Appeals held that the District Court had erred in reaching the merits of the action, and the Fifth Circuit vacated the District Court's denial of the Foundation's partial summary judgment motion. (Appendix at pp. A16-A17). The Fifth Circuit also held that the District Court had had no subject matter jurisdiction over the federal inverse condemnation claim, and that the District Court had properly dismissed that action rather than remanding it. (Appendix at pp. A15-A16).

Finally, the Court of Appeals held that the District Court had properly dismissed the Foundation's § 1983 claim, both because of a lack of subject matter jurisdiction under the Eleventh Amendment, and because of a failure to state a cognizable cause of action. According to the Fifth Circuit, the State itself was the real party in interest, even though Mauro was the named defendant. The Court of Appeals held that any award of possession of the Disputed Property to the Foundation would be tantamount to an award of retrospective damages against the State. The Fifth Circuit also held that, because the State had a colorable claim to the Disputed Land, no federal court had jurisdiction to adjudicate the § 1983 action. (Appendix at pp. A7-A15). Thus, the Fifth Circuit held that the Foundation could not seek relief in any federal or state forum under § 1983, even though it was uncertain whether other avenues for redress were available.

REASONS FOR GRANTING THE WRIT

I. To the extent that the Fifth Circuit intended to affirm the District Court's ruling that a dispute between a private party and a state official involving the right to possession of real property cannot present a federal question or implicate a constitutionally protected right because questions of rights in real property are governed by state law, the Fifth Circuit's ruling conflicts with decisions by this Court and by other Circuits.

The Fifth Circuit affirmed the District Court's decision under Fed. R. Civ. P. 12(b)(1),(6) to dismiss the Foundation's § 1983 action against Mauro for lack of subject matter jurisdiction and for failure to state a valid claim. The rationale that the District Court gave for its ruling was that questions concerning ownership of the Disputed Land are governed by Texas law, and therefore that the Foundation had failed to allege that it had been deprived of a right guaranteed by federal law. Moreover, under the Eleventh Amendment, a federal court has no jurisdiction to order a state official to obey state law as such. *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 119-23, 104 S. Ct. 990, 918-20, 79 L. Ed. 2d 67 (1984) ("*Pennhurst II*"). The Fifth Circuit's final opinion did not expressly address the District Court's reasoning. To the extent that the Fifth Circuit meant to endorse the position that the District Court had taken, however, its ruling is contrary to decisions by this Court and by other Circuits.

The Fourteenth Amendment is designed to protect property rights against the arbitrary actions of a state and its officers. "Property" consists of mutual or law-backed

expectations or understandings that give rise to a legitimate claim of entitlement. *Kaiser Aetna v. United States*, 444 U.S. 164, 178-79, 100 S. Ct. 383, 392-93, 62 L. Ed. 2d 332 (1979). The Constitution *ex proprio vigore* neither establishes nor defines any property rights, however. *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 2709, 33 L. Ed. 2d 548 (1972). Thus, the Fourteenth Amendment protects property interests that it does not create. *Lucas v. South Carolina Coastal Council*, ___ U.S. ___, ___, 112 S. Ct. 2886, 2901, 120 L. Ed. 2d 798 (1992).

In any federal claim alleging a deprivation of property without due process of law, the first analytical step is to determine whether the claimant has a colorable property interest. This will always involve a source of property rights independent of the Constitution. In the case of real property, the inquiry will involve state law. *Lucas*, ___ U.S. at ___-___, 112 S. Ct. at 2899-2901. Once it has been determined that the claimant has a colorable state law property interest, the questions whether the actions of state officials rise to the level of a deprivation, and, if so, whether the claimant has been denied due process, are federal law issues. *Id.*, ___ U.S. at ___-___, 112 S. Ct. at 2892-93.

This Court has consistently held that the Fourteenth Amendment and 42 U.S.C. § 1983 are designed precisely to prevent a state and its officers from flouting the understandings and expectations that the state's own property law creates. *Lucas*, ___ U.S. at ___, n.7, ___-___, 112 S. Ct. at 2896 n.7, 2899-2901; *Dennis v. Higgins*, 498 U.S. 439, 443-46, 111 S. Ct. 865, 868-70, 112 L. Ed. 2d 696 (1991).

Having established such expectations, a state and its officials may not set the state's own property law at naught. *Federal law* prohibits a sovereign or its officers from expropriating state-created property rights arbitrarily. *Lucas*, ___ U.S. at ___, 112 S. Ct. at 2901; *accord United States v. Lee*, 106 U.S. (16 Otto), 196, 208-09, 221, 1 S. Ct. 240, 250-51, 261, 27 L. Ed. 141 (1882). Federal protection for real property rights created by state law is especially vigorous. *Kaiser Aetna*, 444 U.S. at 178-80, 100 S. Ct. at 392-93.

Other Circuits have likewise held that the need to ascertain state law governing property rights is no obstacle either to stating a federal claim or to federal court jurisdiction, because federal law incorporates and vindicates state law property rights. Other Circuits have noted that this Court's holding in *Pennhurst II* only prohibits a federal court from ordering state officials to obey state law *qua* state law; when a rule of federal law – such as the constitutional protections afforded to private property – incorporates state law, then *Pennhurst II* has no application. *E.g., Mont v. Heintz*, 849 F.2d 704, 709-10 (2d Cir. 1988); *Everett v. Schramm*, 772 F.2d 1114, 1119 (3d Cir. 1985). Recently, the Sixth Circuit has expressly held that the fact that a court must look to state law to determine the claimant's property rights does not mean that a claim for deprivation of property without due process presents only a state law issue. In such a case, a § 1983 action for prospective relief against state officials will lie, and the claim will not be barred by *Pennhurst II*. *Williams v. Commonwealth of Kentucky*, 24 F.3d 1526, 1543-44 (6th Cir. 1994).

II. The Fifth Circuit's ruling that a claim for prospective declaratory and injunctive relief against a state official may be dismissed for failure to allege a valid claim under 42 U.S.C. § 1983, and for lack of federal subject matter jurisdiction, on the basis of piercing the pleadings, examining the prayer for relief, and purporting to determine that the state itself is the real party in interest, conflicts with decisions by this Court and by other Circuits.

The Fifth Circuit affirmed the District Court's decision to dismiss the Foundation's § 1983 claim for prospective declaratory and injunctive relief against Mauro both on Eleventh Amendment jurisdictional grounds and on the basis of the Foundation's supposed failure to state a proper claim under 42 U.S.C. § 1983. Fed. R. Civ. P. 12(b)(1),(6). The Court of Appeals ostensibly looked only to the gravamen of the pleadings. The Fifth Circuit expressly held that summary judgment under Fed. R. Civ. P. 56 was not appropriate, and that the District Court had had no jurisdiction to reach any summary judgment issue. (Appendix at pp. A16-A17).

The Court of Appeals in fact reached its decision by piercing the Foundation's pleadings, looking to the Foundation's prayer for relief, and concluding that the Foundation was seeking a judgment against the State itself. Under the Eleventh Amendment, a state may not be sued by a private party in a federal court without the state's consent, and a state is not a "person" within the meaning of 42 U.S.C. § 1983. The Fifth Circuit concluded that the Foundation had failed to allege a cognizable § 1983 action, and that no federal court had any subject matter

jurisdiction to entertain the Foundation's claim against Mauro, because, according to the Fifth Circuit, the State itself was the "real" defendant. (Appendix at pp. A7-A15).

Although the questions of federal subject matter jurisdiction and of stating a viable claim under § 1983 are distinct, they are closely related. *Keniston v. Roberts*, 717 F.2d 1295, 1298-1302 (9th Cir. 1983). The Fifth Circuit did not distinguish the two issues. To invoke federal question jurisdiction (or to state a claim under § 1983), a claimant need only allege an entitlement to redress for a violation of federally guaranteed rights, and the claim must not be obviously frivolous. *See Jackson Transit Auth. v. Local Div. 1285, Amalgamated Transit Union, AFL-CIO-CLC*, 457 U.S. 15, 21 n.6, 102 S.Ct. 2202, 2206 n.6, 72 L. Ed. 2d 639 (1982).

This Court has had little patience with the summary dismissal of § 1983 actions under Fed. R. Civ. P. 12(b). All facts that the claimant has alleged must be taken as true. *Zinermon v. Burch*, 494 U.S. 113, 118, 110 S. Ct. 975, 979, 108 L. Ed. 2d 100 (1980). Dismissal is appropriate only if it appears certain that the claimant can adduce no set of facts that would provide a basis for a federal court to grant any relief. *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 102, 2 L. Ed. 2d 80 (1957).

A. The Fifth Circuit's procedure in piercing the pleadings in sustaining the dismissal of a claim, conflicts with this Court's decisions.

Judged by these standards, the Fifth Circuit's procedure in the present case conflicts with other federal

appellate holdings in at least four respects. First, this Court has held that the claimant's pleadings may not be pierced in deciding a motion to dismiss. *Zinermon*, 494 U.S. at 118, 110 S. Ct. at 979. All allegations must be liberally construed in the claimant's favor. *Jenkins v. McKeithen*, 395 U.S. 411, 421, 89 S. Ct. 1843, 1848, 23 L. Ed. 2d 404 (1969). Here, the Foundation plainly alleged that it owned the Disputed Land, and that Mauro, acting under color of state law, had deprived the Foundation of its property without due process of law. Not merely did the Court of Appeals go beyond the Foundation's assertions; the Court of Appeals accepted as true *Respondents'* assertion that the State had a colorable claim to the Disputed Land.

B. The Fifth Circuit's procedure in looking to the prayer for relief in order to determine the gravamen of a claim in order to uphold the dismissal of the claim, conflicts with decisions by other Circuits.

Second, by looking to the Foundation's prayer for relief, the Fifth Circuit purported to determine that the Foundation was attempting to use its § 1983 claim to obtain a judgment for title to the Disputed Land that would bind the State. This sort of analysis is diametrically opposed to the approach taken by other Circuits, which have held that the plaintiff's prayer for relief should *not* be considered in weighing whether to dismiss a claim. A claimant is entitled to any relief that the facts and the law may justify, irrespective of the relief for which the claimant may have prayed. According to other Circuits, a prayer for relief is irrelevant in deciding

a motion to dismiss. *Doe v. United States Dept. of Justice*, 753 F.2d 1092, 1104 (D.C. Cir. 1985); *Norwalk CORE v. Norwalk Redev. Agency*, 395 F.2d 920, 926 (2d Cir. 1968).

C. The Fifth Circuit's conclusion that an action for possession of property against a sovereign's officer, wherein the sovereign's title may be placed in issue, is necessarily equivalent to seeking an adjudication of title binding against the sovereign itself, conflicts with decisions by this Court.

Third, the Fifth Circuit ignored the jurisprudence of *Ex parte Young*, 209 U.S. 123, 159-60, 28 S. Ct. 441, 454, 52 L. Ed. 714 (1908). The Foundation stated clearly that its § 1983 claim was brought against Mauro in his official capacity only, and not against the State itself. Under the fiction of *Ex parte Young*, a state official who has violated the claimant's constitutional rights is stripped of any representative capacity. All privity between the state and the official is severed. Consequently, a judgment for prospective declaratory or injunctive relief against the official is not deemed a judgment against the state. *Papasan v. Allain*, 478 U.S. 265, 276-77, 106 S. Ct. 2932, 2939-40, 92 L. Ed. 2d 209 (1986). An action for prospective relief against a state officer may be brought under 42 U.S.C. § 1983. *Hafer v. Melo*, 502 U.S. 21, ___, 112 S. Ct. 358, 363, 116 L. Ed. 2d 301 (1991).

When a private party alleges that a government official has expropriated his or her property under color of the sovereign's claim of right or title, and has done so without due process of law, this Court has long held that the private party may bring an action against the official to obtain

possession of the property. *Lee*, 106 U.S. (16 Otto) at 218, 1 S. Ct. at 259-62. The official may indeed try to show that the sovereign has good title, and thus that continued possession of the disputed property by the official does not violate the Constitution. If the officer prevails, then privity between the officer and the sovereign will be established, and the sovereign may take advantage of the preclusive effect of the judgment. *Land v. Dollar*, 330 U.S. 731, 738-39, 67 S. Ct. 1009, 1012-13, 91 L. Ed. 1209 (1947). If the claimant prevails, however, all privity between the official and the state is destroyed, and therefore the state is not bound by the judgment. *Tindal v. Wesley*, 167 U.S. 204, 221-23, 17 S. Ct. 770, 777-78, 42 L. Ed. 137 (1897).[1] Accordingly, an *in personam*

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[1] The Fifth Circuit believed that *Tindal* had been completely overruled by *Larson v. Domestic & Foreign Service Corp.*, 337 U.S. 682, 69 S. Ct. 1457, 93 L. Ed. 1628 (1949). As this Court has observed, however, *Larson* "overruled" *Tindal* only in a very narrow and attenuated sense. Under *Larson*, an action against a state official for prospective declaratory and injunctive relief will not lie if all that the plaintiff has alleged is a common law tort or a mere violation of state law in the execution of the official's duties. In *Tindal*, the plaintiff may have alleged no more than a common law trespass. *See Pennhurst II*, 465 U.S. at 109 n.19, 110-114, 104 S. Ct. at 913 n.19, 913-15. On the other hand, the *Larson* Court implicitly reaffirmed the bedrock principle of *Tindal*: that if the plaintiff claims title to property that an official is holding under color of the sovereign's claim of right – *i.e.*, if the official's action amounts to a government sanctioned taking – then an action for prospective relief against the official will lie. *See Larson*, 337 U.S. at 696-98, 69 S. Ct. at 1464-65. Moreover, well after *Larson*, both this Court and other Circuits have continued to cite *Tindal* as good law. *E.g.*, *Florida Dept. of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 685, 697, 102 S. Ct. 3304, 3315, 3321, 73 L. Ed. 2d 1057 (1982); *Kozera v. Spirito*, 723 F.2d 1003, 1008-09 (1st Cir. 1983).

judgment against a sovereign's officer declaring that the claimant has superior title has no preclusive effect on the sovereign. The sovereign may bring a later action to vindicate its ownership. What the claimant may gain is a superior right to possession as against the official, not superior title as against the state. *Florida Dept. of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 685-86, 697-700, 102 S. Ct. 3304, 3314-16, 3321-22, 73 L. Ed. 2d 1057 (1982).

The Fifth Circuit purported to find support for its position in *Toledo, Peoria & Western R. Co. v. State of Illinois, Dept. of Transp.*, 744 F.2d 1296 (7th Cir. 1984), *cert. denied*, 470 U.S. 1051, 105 S. Ct. 1751, 84 L. Ed. 2d 815 (1985). There, a railroad brought a § 1983 action against an agency of the State of Illinois, which was tantamount to naming the state *eo nomine* as a defendant. The railroad sought an adjudication that the state had abandoned an easement in the railroad's property. The district court ordered the State of Illinois itself "to relinquish its claim to any interest in the property." *Id.* at 1298.

The Seventh Circuit reversed. A state is not a "person" for purposes of § 1983, and a federal court has no jurisdiction to entertain a claim by a private party against an unconsenting state. *Id.* at 1297, 1299. The Seventh Circuit also held that an adjudication of title that ostensibly bound the state itself was equivalent to an award of retrospective damages. *Id.* at 1299 n.1.

The Fifth Circuit misapplied the Seventh Circuit's decision by concluding that the Foundation sought a judgment that would bind the State of Texas, and that any judgment against Mauro necessarily would be equivalent to ordering the State itself "to relinquish its claim to any

interest in the property." *Toledo, Peoria*, 744 F.2d at 1298. The Fifth Circuit's misplaced reliance on the Seventh Circuit's holding merely illustrates the Fifth Circuit's failure to comprehend this Court's doctrine that a suit against an officer of a despotic and recalcitrant sovereign is by no means the same thing as a suit against the sovereign itself.

No decision by this Court has ever declared that any doctrine of sovereign immunity renders a deprivation of private real property unredressable by way of an action based on the principles of *Lee* and *Ex parte Young*. A claimant may bring an action for prospective declaratory and injunctive relief against the official in possession, and the claimant may assert his or her superior title in so doing, even if an adjudication of title as against the sovereign itself may be barred. *Ramirez de Arellano v. Weinberger*, 745 F.2d 1500, 1525-26 (D.C. Cir. 1984) (en banc), *vacated on other grounds*, 471 U.S. 113, 105 S. Ct. 2353, 86 L. Ed. 2d 255 (1985); *see Hirtz v. State of Texas*, 974 F.2d 663, 665 (5th Cir. 1992).

D. The Fifth Circuit's ruling that a judgment against a Texas official awarding possession of disputed property to a claimant would necessarily be a judgment against the State itself because of the ancillary impact upon the state's treasury that the judgment might have, is in conflict with decisions by this Court.

The Fifth Circuit believed that any judgment declaring that the Foundation had a superior right to possession of the Disputed Land would have an impact on the State. Accordingly, the Fifth Circuit concluded that the

Foundation's § 1983 claim against Mauro was equivalent to seeking damages for past wrongs against the State. A state officer acting in his or her official capacity is not a "person" for purposes of § 1983 if the claim is for monetary damages. *Hafer*, 502 U.S. at ___, 112 S. Ct. at 358. Furthermore, as a matter of jurisdiction, the Eleventh Amendment prohibits any suit in a federal court that seeks to recover retrospective damages from a state's treasury. Therefore, the Court of Appeals held that the Foundation's § 1983 action was barred. (Appendix at pp. A10-A12).

The Fifth Circuit's ruling conflicts with this Court's decisions in several respects. First, even if the Court of Appeals had been correct in considering the Foundation's prayer for relief, the Foundation did not seek retrospective damages or just compensation under its § 1983 claim. The Foundation prayed only for prospective relief with respect to the Disputed Land as against Mauro.

Any impact on the State's treasury, therefore, would be purely ancillary to the prospective relief. This Court has held that such an ancillary impact on the public purse, no matter how great it may be, is entirely permissible in an *Ex parte Young* action. *Papasan*, 478 U.S. at 278-79, 106 S. Ct. at 2940-41; *Edelman v. Jordan*, 415 U.S. 651, 658, 94 S. Ct. 1347, 1358, 39 L. Ed. 2d 662 (1974). Indeed, this Court has expressly held that an award of possession of specific property is *not* equivalent to an award of damages against a state. *Treasure Salvors*, 458 U.S. at 699, 102 S. Ct. at 3322.

The Fifth Circuit, then, placed itself squarely on a collision course with the decisions of this Court and of

other Circuits, both in the procedures that it used in purporting to determine that the State was the "real" party defendant under the Foundation's § 1983 claim, and in concluding that an action for prospective declaratory and injunctive relief against a Texas official is necessarily tantamount to an action seeking an adjudication of title that will bind the State itself. Ultimately, the Court of Appeals held that 42 U.S.C. § 1983 and *Ex parte Young* may not be used to redress a government expropriation of real property if title to the property is disputed in any way. This Court has held, on the contrary, that a federal cause of action for declaratory and injunctive relief against state officials must be available, particularly when it is not clear that any state law remedy is open to vindicate constitutionally protected rights. *General Oil Co. v. Crain*, 209 U.S. 211, 226-27, 28 S. Ct. 475, 480, 58 L. Ed. 754 (1908). The Fifth Circuit's decision is so aberrational, and the issue is of such importance, that a writ of certiorari should issue.

III. The Fifth Circuit's ruling that an action against a state official under 42 U.S.C. § 1983 for prospective relief and for possession of real property will not lie if the state has a colorable claim to the disputed property, conflicts with decisions by this Court and by other Circuits.

A. The Fifth Circuit's ruling that a test devised to determine whether a federal court may seize property in order to establish its *in rem* jurisdiction may be applied to an *in personam* action against a state official, conflicts with decisions by this Court and by other Circuits.

In an action alleging that a government official has deprived the claimant of property without due process of

law, the rule followed in most Circuits is that, at the stage of a motion to dismiss, all that the *claimant* must do is allege some colorable property interest that is not wholly insubstantial on its face. The strength of that alleged interest should await an adjudication on the merits. *E.g.*, *Keniston*, 717 F.2d at 1299; *Fountain v. Metropolitan Atlanta Rapid Transit Auth.*, 678 F.2d 1038, 1041-42 (11th Cir. 1982).

Ostensibly relying on this Court's holding in *Treasure Salvors*, however, the Fifth Circuit declared that if a *state* has a colorable claim to disputed property, and if the defendant officer is colorably authorized by the state to hold that property, then a § 1983 action against the state official for declaratory and injunctive relief seeking possession of the property will not lie. The official will necessarily interpose the validity of the state's claim as a defense. The Fifth Circuit concluded that, unless a state's claim to the property is facially frivolous, attempting such a procedure in a federal court violates the Eleventh Amendment. (Appendix at pp. A12-A15).

This conclusion conflicts with decisions by this Court and by other Circuits, in part because the Fifth Circuit misapprehended the fiction of *Ex parte Young*. The Fifth Circuit also placed itself in conflict with holdings by this Court and by other Circuits in failing to understand the very nature of the issues at stake in *Treasure Salvors*.

The Fifth Circuit ignored that *Treasure Salvors* was an *in rem* admiralty action that presented no fewer than three distinct questions. The most important of these was the validity of the arrest warrant that transferred the disputed property to the custody of the district court *pendente lite*.

In an *in rem* admiralty action, a federal court's jurisdiction is established by a seizure of the vessel or other property, which is thereby placed *in custodia legis* until all claims to and against the *res* have been adjudicated. "To obtain jurisdiction to proceed to a decree *in rem* in admiralty, it is essential that the *res* come into the *possession of the court by seizure* under adequate warrant of arrest." *Yokohama Specie Bank, Ltd. v. Chengting T. Wang*, 113 F.2d 329, 331 (9th Cir.) (emphasis added), *cert. denied*, 311 U.S. 690, 61 S. Ct. 71, 85 L. Ed. 466 (1940). Consequently, any party who claims to own the vessel or other property is deprived of it *pendente lite*. The property has been *expropriated by the federal court* until the litigation has been decided. *See Neopolitan Navigation, Ltd. v. Tacor Marine, Inc.*, 777 F.2d 1427, 1430 (11th Cir. 1985).

In *Treasure Salvors*, this feature of an admiralty arrest warrant was complicated by the fact that state officials purported to hold the disputed property under the state's ostensible claim of right. There are obvious Eleventh Amendment problems when a federal court seizes property allegedly owned by a state from state officials. The central issue in *Treasure Salvors*, then, went to a dispute *between the district court on one side, and the state officials on the other*: could the district court, consistent with the Eleventh Amendment, seize the *res* from the state officers, who claimed that the *res* was state property, and hold the *res* until all claims to the property had been adjudicated? *Treasure Salvors*, 458 U.S. at 682-83, 697, 102 S. Ct. at 3313-14, 3321.

This Court upheld the district court's *in rem* jurisdiction. In so doing, this Court applied the "colorable claim" test that the Fifth Circuit purported to use. First, the State

of Florida had no colorable claim to the disputed property. Second, the state officials had no colorable claim that the State of Florida or state law had authorized them to take possession of the *res*. Accordingly, by seizing the property *pendente lite*, the district court was not in any way interfering with the state's rights. *Treasure Salvors*, 458 U.S. at 694, 696, 699-700, 102 S. Ct. at 3319, 3320, 3322.

The principle of the colorable claim test has no application whatsoever in this case. The Foundation did not ask the District Court to seize the Disputed Land from Mauro and to place it *in custodia legis* pending the resolution of the case. The relief that the Foundation seeks under its § 1983 claim is purely *in personam* against Mauro.

Other Circuits have realized that the *Treasure Salvors* colorable claim test went to the question of the validity of an arrest warrant in an *in rem* action – *i.e.*, to a dispute as to whether a federal court could seize property, rather than to a dispute involving a federal court's jurisdiction to enter an *in personam* decree against a state official. *E.g.*, *Zych v. Wrecked Vessel Believed to be the "Lady Elgin"*, 960 F.2d 665, 669-70 (7th Cir.), *cert. denied*, ___U.S.___, 113 S. Ct. 1491, 121 L. Ed. 2d 430 (1992); *Maritime Underwater Surveys, Inc. v. Unidentified, Wrecked and Abandoned Vessel*, 717 F.2d 6, 8 (1st Cir. 1983). In failing to comprehend the context in which this Court's colorable claim test was meant to apply, the Fifth Circuit placed itself in conflict with the manner in which other Circuits have correctly interpreted *Treasure Salvors*.

Two other questions – apart from the validity of the arrest warrant – were at issue in *Treasure Salvors*. One was

whether the district court was prohibited by the Eleventh Amendment from adjudicating the title of the State of Florida to the disputed property. This was a jurisdictional issue involving the rights of the state itself and of the federal court, irrespective of the rights of the state officials, and irrespective of whether the proceedings were *in personam* or *in rem*. This Court concluded that the district court had had no jurisdiction to adjudicate the state's title to the property by entering a judgment that would bind an unconsenting sovereign as such. *Treasure Salvors*, 458 U.S. at 697, 699-700, 102 S. Ct. at 3321, 3322.

This aspect of the *Treasure Salvors* holding, however, had nothing to do with the colorability of the state's claim. Other Circuits have held that the mere existence of a state's claim to specific property prohibits a federal court from entering an adjudication of ownership that actually will bind the state, irrespective of the strength of the claim. Even in admiralty *in rem* actions, other Circuits have held that a federal court may enter a judgment of title that will bind all the world besides, but not an unconsenting state. *"Lady Elgin"*, 960 F.2d at 670; *Maritime Underwater Surveys*, 717 F.2d at 8.

The Fifth Circuit suggested that the colorability of the State's claim to the Disputed Land prevented a federal court from adjudicating the State's rights. This is in conflict with *Treasure Salvors* and with the holdings of other Circuits. The District Court had no jurisdiction to make an adjudication of title that would have had a preclusive effect on the State, regardless of the colorability of the State's claim. The Foundation sought no such adjudication under its § 1983 action.

The third issue in *Treasure Salvors* was whether the district court could award *possession* of the disputed property to the claimants. This issue involved a *dispute between the claimants and the state officials*. This Court answered that question in favor of the claimants, relying on *Ex parte Young*, *Lee*, and *Tindal*. In resolving this question, however, the colorability of the state's claim to the property went to the *merits* of who ultimately should be awarded possession, *not to the jurisdiction of the district court* or to the question of an Eleventh Amendment bar. *Treasure Salvors*, 458 U.S. at 690-700, 102 S. Ct. at 3317-22; *see id.*, 458 U.S. at 694-90, 102 S. Ct. at 3314-17. Moreover, the resolution of this issue did not depend on whether the action happened to be *in personam* or *in rem*.

This analysis is consistent with the decisions of other Circuits, which have held that, even in an *in rem* admiralty action, a federal court may enter a judgment as to the ownership of disputed property that will bind the whole world except an unconsenting state. *"Lady Elgin"*, 960 F.2d at 669-70; *see Maritime Underwater Surveys*, 717 F.2d at 8. The parties that such a judgment could bind would include state officials, although the sovereign as such would not be bound.

B. In holding that title to disputed littoral property had been "effectively adjudicated" in an action brought over forty years ago, despite supervening changes in both the facts and the law, the Fifth Circuit placed itself in conflict with the holdings of other federal courts and of state courts as well.

Even on its own terms, the Fifth Circuit's conclusion as to the colorability of the State's claim to the Disputed

Land was in conflict with holdings by other federal courts and with state court decisions. The Fifth Circuit believed that its own opinion in *Humble Oil & Refining Co. v. Sun Oil Co.*, 190 F.2d 191 (5th Cir.), *reh'g denied*, 191 F.2d 705 (5th Cir. 1951), *cert. denied*, 342 U.S. 920, 72 S. Ct. 367, 96 L. Ed. 687 (1952), had "effectively adjudicated" title to the Disputed Land in favor of the State. (Appendix at pp. A2, A14). *Humble Oil* involved, *inter alia*, one of the State's lessees and the Foundation's predecessor-in-interest; no Texas official was a party, and the Fifth Circuit held that the State itself should not have been allowed to intervene. Quite apart from the fact that *Humble Oil* only involved certain tracts of the Disputed Land, however, the Fifth Circuit ignored controlling and persuasive authority in believing that its own prior judgment still had any force.

First, the Fifth Circuit overlooked the fact that the Disputed Land is *littoral* property, and hence that its boundary is subject to natural change. Under Texas law, when the area of fast land expands, either through the depositing of new sediment (accretion) or through the receding of the water (reliction), the littoral owner's property expands. Conversely, when the shoreline is washed away (erosion) or when the water level rises (submergence), the littoral owner's property diminishes. The present shoreline is the boundary. *E.g.*, *Rudder v. Ponder*, 156 Tex. 185, 293 S.W.2d 736, 742-43 (1956); *see Nebraska v. Iowa*, 143 U.S. 359, 360-70, 12 S. Ct. 396, 397-400, 36 L. Ed. 186 (1892).

Here, the Foundation has not merely alleged, but also adduced substantial evidence, that the area of fast land

had expanded since *Humble Oil* was decided. Consequently, the Foundation's littoral property had expanded, while the State's submerged property had diminished accordingly.

Every state and federal court that has addressed analogous facts has held that a previous boundary adjudication has no preclusive force. When a boundary is littoral or riparian – *i.e.*, when it is subject to natural change – then a prior boundary judgment cannot remain binding if the boundary has shifted. *101 Ranch v. United States*, 714 F. Supp. 1005, 1007, 1011 (D.N.D. 1988), *aff'd*, 905 F.2d 180 (8th Cir. 1990); *Sotomura v. County of Hawaii*, 460 F. Supp. 473, 482 (D. Hawaii 1978); *see, e.g., Pankratz v. State Dept. of Highways*, 652 P.2d 68, 73-74 (Alaska 1982). In other words, when the littoral or riparian owner's title accrues *after* the prior judgment, then the earlier judgment has no force. *See United States Gypsum Co. v. Greif Bros. Cooperage Corp.*, 389 F.2d 252, 261 (8th Cir. 1968); *see also, e.g., Oklahoma v. Texas*, 272 U.S. 21, 36-42, 47 S. Ct. 9, 14-16, 71 L. Ed. 145 (1926); *Nebraska v. Iowa*, 143 U.S. at 360-70; 12 S. Ct. at 397-400. Indeed, the Attorney General of Texas has argued successfully that coastal boundaries are inherently subject to relitigation, because they are subject to natural change. *Matcha v. Mattox*, 711 S.W.2d 95, 99-100 (Tex. App. – Austin 1986, writ ref'd n.r.e.), *cert. denied*, 481 U.S. 1084, 107 S. Ct. 1911, 95 L. Ed. 2d 517 (1987). Genuflecting before a prior boundary adjudication when there is substantial evidence that the boundary has shifted since that judgment was entered is contrary to state law and to federal common law.

Second, the federal courts deciding *Humble Oil* incorrectly forecast Texas littoral boundary law. Following *Erie*

R. Co. v. Tompkins, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938), the Fifth Circuit in *Humble Oil* guessed as to how Texas law would determine the boundary between the land submerged by the Laguna Madre (which is owned by the State) and the fast land (which is owned by the littoral proprietors). The Court of Appeals concluded that the Texas Supreme Court would adopt the single highest tide in winter as the boundary. *Humble Oil*, 190 F.2d at 195.

A few years later, however, the Texas Supreme Court concluded that the littoral boundary of Spanish or Mexican land grants (such as the Foundation's property) must be determined by the level of mean higher high tide, which is the average of the daily high tides calculated over a cycle of approximately 19 years. *Luttes v. State*, 159 Tex. 500, 324 S.W.2d 167, 174, 191 (1958). The effect of the *Luttes* holding is to allow more property to the littoral owner and less to the State than the test that the *Humble Oil* court guessed that Texas law would apply.

A strong case for supervening changes in both factual circumstances and in the controlling law, then, make the State's claim to the Disputed Land far less than ironclad. The Foundation submits that it has a colorable claim to the Disputed Land. This is all that is needed to invoke valid federal jurisdiction over the claim for prospective relief against Mauro, and to state a cause of action under 42 U.S.C. § 1983.

CONCLUSION

The Fifth Circuit's opinion, like the District Court's ruling that the Fifth Circuit affirmed, is a false beacon, misguiding lower courts and potentially misleading other Circuits on the jurisprudence of 42 U.S.C. § 1983. The reasoning that this Court has employed in other cases stands in marked contrast to the result that the Court of Appeals reached here. Furthermore, the important and troublesome issues posed by the Fifth Circuit's decision call for resolution by this Court. Otherwise, property rights may exist only at the whim of an arbitrary sovereign. For the reasons set forth, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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The JOHN G. AND MARIE STELLA KENEDY MEMORIAL FOUNDATION,
Plaintiff-Appellant,

v.

Garry MAURO, Commissioner of the General Land Office, et al.,
Defendants-Appellees.

No. 92-7714

United States Court of Appeals,
Fifth Circuit.

May 27, 1994.

Rehearing Denied June 29, 1994.

Before KING and BARKSDALE, Circuit Judges, and PARKER,* District Judge.

KING, Circuit Judge:

The John G. and Marie Stella Kenedy Memorial Foundation (the Foundation) appeals the district court's dismissal of its claim brought under 42 U.S.C. § 1983 against Garry Mauro (Mauro), Commissioner of the Texas General Land Office, in his official capacity, and its Fifth Amendment inverse condemnation claim against the State of Texas. The Foundation also appeals the district court's denial of its motion for partial summary judgment. We affirm the district court's judgment of dismissal and vacate that portion of the judgment denying the Foundation's motion for partial summary judgment.

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*Chief Judge of the Eastern District of Texas, sitting by designation.

I. BACKGROUND

In January 1990, the Foundation filed suit against Mauro and the State of Texas in Texas state court in Kenedy County, Texas. The Foundation sought declaratory and injunctive relief to determine boundary and title to certain real property against Mauro, in his capacity as Commissioner of the Texas General Land Office, under 42 U.S.C. § 1983 and the Fourteenth Amendment of the United States Constitution, as well as under state common law. The Foundation also asserted a takings claim against the State of Texas under Article I, Section 17 of the Texas Constitution.

The Foundation specifically contended that Mauro, acting under color of state law, refused to recognize the proper location of the boundary between the Foundation's property and state-owned land in Kenedy County. The property at issue is part of the original Spanish and Mexican grants, La Barreta and Las Motas de la Barreta, respectively, and is sometimes covered by the body of water known as the Laguna Madre. The Foundation argued that although title to portions of the disputed land had been effectively adjudicated to the State in *Humble Oil & Refining Co. v. Sun Oil Co.*, 190 F.2d 191 (5th Cir. 1951), *cert. denied*, 342 U.S. 920, 72 S.Ct. 367, 96 L.Ed. 687 (1952), there had since been a change in both the physical characteristics of the disputed land and in state law interpreting its physical boundaries by virtue of the Texas Supreme Court's holding in *Luttes v. State*, 324 S.W.2d 167 (Tex. 1959). Hence, according to the Foundation, an application of *Luttes* would establish that the State's claim to the disputed land was no longer valid. Although the Foundation conceded that Mauro had the statutory

authority to determine the boundary between private property and state-owned submerged land, Mauro's refusal to recognize *Luttes* as controlling – while he continued to grant mineral leases on a portion of the disputed property for the State's benefit – amounted to a deprivation of the Foundation's real property without due process of law.

In February 1990, Mauro and the State (the defendants) removed the case to the United States District Court for the Southern District of Texas on the basis of federal question jurisdiction. In its original answer filed in federal court, the defendants stated that the district court had subject matter jurisdiction over the Foundation's § 1983 claim against Mauro in his official capacity for prospective injunctive relief. However, the defendants denied that the court had jurisdiction over the remaining claims. The defendants then filed a motion for summary judgment. Specifically, they asserted (1) that the Foundation's claims were barred by res judicata, collateral estoppel, and stare decisis in light of the Fifth Circuit's decision in *Humble Oil;* (2) that the State of Texas was entitled to judgment as a matter of law with respect to the Foundation's claim under Article I, Section 17 of the Texas Constitution because title to the disputed property rested with the State; (3) that the Foundation's action was barred by limitations and under the doctrine of laches; (4) that the Foundation's state law claims against Mauro were barred by the doctrine of sovereign immunity; and (5) that the Foundation's claim against Mauro was not a cognizable claim under § 1983 and barred by the Eleventh Amendment.

The Foundation then amended its complaint to assert additionally an inverse condemnation claim against the State of Texas under the Fifth Amendment to the United States Constitution. In response to this amended complaint, the defendants filed an amended answer in which they denied that the relief sought by the Foundation for its § 1983 claim was proper prospective relief. The defendants also pleaded the various affirmative defenses raised in their earlier motion for summary judgment, as well as "sovereign immunity and the Eleventh Amendment to the U.S. Constitution."

The Foundation subsequently filed its own motion for partial summary judgment, seeking a judgment declaring that the disputed land was not "submerged" land owned by the State but rather land which belonged to the Foundation as part of its upland property. The Foundation also requested a ruling that its claims were not barred by res judicata or collateral estoppel.

After a hearing on the parties' cross-motions for summary judgment, the district court dismissed the entire suit for lack of subject matter jurisdiction and denied the Foundation's motion for partial summary judgment. The district court reasoned that the Foundation's state law claim against Mauro was barred by the Eleventh Amendment, as interpreted in *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 104 S.Ct. 900, 79 L.Ed.2d 67 (1984). The district court also determined that Mauro's actions, which formed the basis of the Foundation's § 1983 claim, were discretionary actions of an elected official acting under a state statute not challenged as unconstitutional. Accordingly, the district court concluded that the Eleventh Amendment barred the Foundation's § 1983 claim in

federal court because the claim was an action against a state official for a violation of state law and the relief requested was against the State, not Mauro. The district court further determined that the Foundation's state and federal takings claims against the State of Texas were barred by the Eleventh Amendment – specifically under the reasoning of *Alabama v. Pugh*, 438 U.S. 781, 98 S.Ct. 3057, 57 L.Ed.2d 1114 (1978).

Several days later, the district court issued an order modifying this dismissal. The district court explained:

> . . . [W]hen this Court issued its Order of Dismissal, it overlooked the removed status of this litigation. Rather than dismiss for lack of jurisdiction all of plaintiff's federal *and* state causes of action against defendants, Garry Mauro, Commissioner of the General Land Office, and the State of Texas, it is the better judgment and the intention of the court to dismiss only those claims of plaintiff that are barred by the Eleventh Amendment of the United States Constitution. These are plaintiff's claims asserted against Commissioner Mauro and the State of Texas pursuant to 42 U.S.C. § 1983 and the Fifth and Fourteenth Amendments.
>
> All other claims the court remands to the 105th Judicial District Court, Kenedy County, Texas for its decision.

The district court thus dismissed both of the Foundation's federal claims, but remanded the state law claims to state court. The Foundation then filed a timely notice of appeal from the district court's order dismissing its federal

claims and denying its motion for partial summary judgment.[1]

II. STANDARD OF REVIEW

Although this court has no jurisdiction to review a district court's judgment which remands a cause of action to state court for lack of subject matter jurisdiction, see 28 U.S.C. § 1447(d); *McDemott Int'l Inc. v. Lloyds Underwriters of London*, 944 F.2d 1199, 1201-03 (5th Cir. 1991); *Mitchell v. Carlson*, 896 F.2d 128, 131 (5th Cir. 1990), any aspect of that judgment which is distinct and separable from the remand proper may be reviewed on appeal, *see City of Waco v. United States Fidelity & Guar. Co.*, 293 U.S. 140, 142-43, 55 S.Ct. 6, 7, 79 L.Ed. 244 (1934); *Mitchell*, 896 F.2d at 132; *see also J.O. v. Alton Community Unit Sch. Dist. 11*, 909 F.2d 267, 271 (7th Cir. 1990) (even if a district court has properly refused to exercise jurisdiction over pendent state law claims, the dismissal of federal claims giving rise to the removal is reviewable). Because the district court's dismissal of the Foundation's federal claims was separate and distinct from its remand of the Foundation's state law claims, this court has jurisdiction to review the dismissal of the Foundation's federal claims.

We review the district court's dismissal of federal claims for lack of subject matter jurisdiction *de novo*. *In re Bradley*, 989 F.2d 802, 804 (5th Cir. 1993); *Hobbs v. Hawkins*, 968 F.2d 471, 475 (5th Cir. 1992); *Benton v. United States*,

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[1] The Foundation has specifically disclaimed any intent to challenge the district court's decision remanding its state law claims to state court.

960 F.2d 19, 21 (5th Cir. 1992). We will not affirm the dismissal " 'unless it appears certain that the plaintiff cannot prove any set of facts in support of [its] claim which would entitle [it] to relief.' " *Hobbs*, 968 F.2d at 475 (quoting *Benton*, 960 F.2d at 21).

III. DISCUSSION

The Foundation raises three arguments on appeal. First, it contends that the district court erroneously dismissed its § 1983 claim for declaratory and prospective injunctive relief against Mauro in his official capacity. Second, the Foundation argues that the district court's disposition of its Fifth Amendment claim against the State of Texas was erroneous. Although the Foundation seemingly concedes that the Eleventh Amendment bars its assertion of this claim in federal court, it contends that the district court nonetheless should have remanded the claim to state court. Third, the Foundation maintains that the district court erred in reaching its motion for partial summary judgment. We address each of the Foundation's claims in turn.

A. Dismissal of the Foundation's § 1983 Claim against Mauro

The Foundation asserts that the district court erred in dismissing its § 1983 claim against Mauro for lack of subject matter jurisdiction due to the Eleventh Amendment bar. The Foundation asserts that in requesting declaratory and prospective injunctive relief against Mauro – who, acting under color of state law, allegedly deprived the Foundation of its property without due

process of law – its claim is not barred by the Eleventh Amendment.

In its amended complaint, the Foundation asserted:

> This is a suit against Garry Mauro in his official capacity as Commissioner of the General Land Office under 42 U.S.C. § 1983 and the Due Process clause of the Fourteenth Amendment to the United States Constitution and under state law, for declaratory and injunctive relief to determine boundary and title to certain real property. . . . Specifically, Defendant Mauro has been and is currently depriving the Foundation of its real property without due process of law, in violation of the Fourteenth Amendment to the United States Constitution.

The Foundation further detailed its requested relief:

> The Foundation requests that this Court determine and declare that all of the Disputed Land is above the vertical elevation of mean higher high water of the Laguna Madre, that the eastern boundary of the disputed Land constitutes the eastern boundary of the Big Barreta and Little Barreta grants, and that the Foundation is the owner of the Disputed Land. Further, the Foundation requests that Defendant Mauro be permanently enjoined from exercising dominion and control over the Disputed Land and leasing any portion of the Disputed Land for oil and gas development or surface use, and be directed to amend all official "state lease tract" maps and other official maps and documents to depict the Disputed Land as privately-owned land and not as state-owned submerged land.

After evaluating the Foundation's claims against Mauro and the ultimate relief requested, the district court concluded that "the true nature of this action is a title dispute" between the Foundation and the State. We agree.

The Foundation emphasized in its complaint that its suit against Mauro was *to determine boundary and title to certain real property.* For relief, the Foundation clearly requested that the district court determine and declare that *the Foundation was the owner* of the disputed land. The Foundation also requested that Mauro be permanently enjoined from leasing any portion of it for mineral development or surface use and that Mauro be directed to amend all state lease tract maps and other official documents *to depict that the disputed land is "privately owned."*

We read this entreaty as one that the Foundation's claim to the disputed property be declared secured as against all the world and that Mauro, in his capacity as Land Commissioner, officially recognize this property as the Foundation's – in other words, that the district court adjudicate title to the property. However, a federal court does not have the power to adjudicate the State's interest in property without the State's consent. *See Florida Dep't of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 682, 700, 102 S.Ct. 3304, 3313, 3322, 73 L.Ed.2d 1057 (1982) (plurality opinion); *id.* at 703, 102 S.Ct. at 3324 (White, J., concurring, joined by Powell, Rehnquist, and O'Connor, JJ.); *see also Tindal v. Wesley*, 167 U.S. 204, 223, 17 S.Ct. 770, 777-78, 42 L.Ed. 137 (1897); *United States v. Lee*, 106 U.S. (16 Otto) 196, 222, 1 S.Ct. 240, 262, 27 L.Ed. 171 (1892) (explaining that the United States could not be made a defendant to a suit concerning its property without its consent under the

doctrine of sovereign immunity). The State of Texas has not so consented.

We also recognize that a state official, such as Mauro, acting in his official capacity, is not a "person" under § 1983 unless the relief requested in a suit against him in this capacity is prospective relief. *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71 & n. 10, 109 S.Ct. 2304, 2312 & n. 10, 105 L.Ed.2d 45 (1989); *see Stem v. Ahearn*, 908 F.2d 1, 4 (5th Cir. 1990), *cert. denied*, 498 U.S. 1069, 111 S.Ct. 788, 112 L.Ed.2d 850 (1991); *see also Howlett v. Rose*, 496 U.S. 356, 365-66, 110 S.Ct. 2430, 2437, 110 L.Ed.2d 332 (1990) ("*Will* establishes that the State and the arms of the State, which have traditionally enjoyed Eleventh Amendment immunity, are not subject to suit [under § 1983] in either federal or state court."). To provide the Foundation with the relief it requests would necessitate a determination by the district court that the State does not have title to the disputed property, title which the State has claimed for the past century and which was effectively adjudicated in the State in *Humble Oil*. Accordingly, the relief the Foundation requests, although nominally against Mauro, is retroactive relief against the State. *See Toledo, Peoria & Western R.R. Co. v. State of Illinois, Dep't of Transp.*, 744 F.2d 1296, 1299 (7th Cir. 1984), *cert. denied*, 470 U.S. 1051, 105 S.Ct. 1751, 84 L.Ed.2d 815 (1985) (holding that the relief "requested by the plaintiff ordering the state to release its interest in real property" is similar to the "retroactive" relief barred by the Eleventh Amendment under *Edelman v. Jordan*, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974), and not the "prospective" relief permitted by *Quern v. Jordan*, 440 U.S. 332, 99 S.Ct. 1139, 59 L.Ed.2d 358 (1979)); *see also Pennhurst*, 465 U.S. at 101 n.

11, 104 S.Ct. at 908 n. 11 (" 'The general rule is that a suit is against the sovereign if "the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration," or if the effect of the judgment would be "to restrain the Government from acting, or to compel it to act." ' " (quoting *Dugan v. Rank*, 372 U.S. 609, 620, 83 S.Ct. 999, 1006, 10 L.Ed.2d 15 (1963) (citations omitted)).

Based on the Foundation's specific request for relief in its complaint against Mauro in his official capacity, the district court had proper reason to dismiss the Foundation's § 1983 claim. *See Stem*, 908 F.2d at 4 (concluding that because under *Will* state officials sued in their official capacities for damages are not "persons" under § 1983, the court lacked subject matter jurisdiction over the plaintiff's claim against the defendants in their capacities as Texas state employees).

The Foundation, however, argues that despite the way it phrased its request for relief, its § 1983 claim was not brought to adjudicate title to the disputed property but for right to possession of that property as against Mauro. We point out that this case was removed to federal court in February 1990. However, it was not until October 21, 1991 – when the Foundation filed a post-submission brief on its § 1983 claim after a hearing on the parties' cross-motions for summary judgment – that the Foundation first suggested that the court should recognize that its § 1983 claim was for right to possession of

the disputed property as against Mauro.[2] The Foundation asserts the same on appeal. The Foundation's argument is thus that a federal court has jurisdiction to hear its suit for declaratory and injunctive relief against the government official *in possession* of its property, i.e., Mauro, who has "invaded and occupied" property rightfully belonging to the Foundation.

We need not decide whether in some sense Mauro is actually "in possession" of the disputed property as the Foundation contends because in order to grant the Foundation the right to possession of this property as against Mauro, the district court would have to determine that title rests in the Foundation and thus adjudicate the State's interest in the disputed property – property which the State has "owned" for the past century. As we have already made clear, a federal court is not empowered to adjudicate the State's interest in property without the State's consent. *See Treasure Salvors, Inc.*, 458 U.S. at 682, 700, 102 S.Ct. at 3313, 3322; *id.* at 703, 102 S.Ct. at 3324 (White, J., concurring, joined by Powell, Rehnquist, and O'Connor, JJ.).

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[2] We recognize that in its reply to Mauro's response to the Foundation's partial motion for summary judgment, filed on August 30, 1991, the Foundation stated that it had asserted a valid § 1983 cause of action because "it was well established that a suit for injunctive relief to obtain possession of property wrongfully held by state officials is not barred by the Eleventh Amendment," citing *Treasure Salvors* and *Tindal* for that proposition. However, it was not until the Foundation filed its post-submission brief on October 21, 1991, that the Foundation actually asserted that its requested relief was for possession of the disputed property as against Mauro.

We also note that the Foundation's reliance on the Supreme Court's decisions in *Lee*, *Tindal*, and *Treasure Salvors* is misplaced. First, the Foundation fails to recognize that *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 69 S.Ct. 1457, 93 L.Ed. 1628 (1949), explicitly overruled *Tindal*, *see Pennhurst*, 465 U.S. at 110 n. 19, 104 S.Ct. at 913 n. 19, and significantly limited *Lee*, *see Larson*, 337 U.S. at 696-97, 69 S.Ct. at 1464-65; *see also Treasure Salvors*, 458 U.S. at 688-89, 102 S.Ct. at 3316-17.

Second, *Treasure Salvors* speaks directly against the Foundation's argument. In *Treasure Salvors*, the Court addressed the issue of whether the district court's arrest warrant in an admiralty *in rem* action, issued against two state officials who held artifacts from an abandoned vessel found off the Florida Keys, was barred by the Eleventh Amendment. A plurality of the Court concluded that the warrant was not so barred. *Id.* at 699, 102 S.Ct. at 3322.

The plurality reached this conclusion by first explaining that the warrant had issued against state officials who were in possession of the artifacts and not the State of Florida itself. *Id.* at 691, 102 S.Ct. at 3318. The plurality next noted that although the officials claimed a state statute as authority to possess these artifacts, the statute permitted officials to hold artifacts which had been found on state-owned submerged land and the artifacts in question had been found in international waters. *Id.* at 695, 102 S.Ct. at 3320. Thus, the state officials were without a colorable claim to these artifacts. *Id.* at 696, 102 S.Ct. at

3320. Finally, the plurality explained that because the warrant sought possession of specific property and was not an *in personam* action brought to recover damages from the State, the warrant was permissible prospective relief. *Id.* at 699, 102 S.Ct. at 3322.

However, the plurality emphasized that the warrant itself merely secured possession of the artifacts and that its execution did not adjudicate the State's right to them. *Id.* at 697, 102 S.Ct. at 3321 (citing *Tindal*, 167 U.S. at 223, 17 S.Ct. at 777-78). The plurality also decided that although this court had properly determined that the Eleventh Amendment did not bar execution of the warrant to secure possession of the artifacts held by state officials we had improperly adjudicated the State's right to those artifacts in making such a determination. *Id.* 458 U.S. at 700, 102 S.Ct. at 3322. The Court then concluded that a federal court did not have the power to adjudicate the State's interest in the artifacts without the State's consent. *See id.*

The instant case is distinguishable from *Treasure Salvors* in that the defendant officials in *Treasure Salvors* had no colorable claim under which they were authorized by the State to hold these artifacts. On other hand, the State has "owned" the property at issue in the instant case for the past century, and title was effectively adjudicated in the State in *Humble Oil*. Moreover, the *Treasure Salvors* plurality determined that the warrant of arrest issued by the district court was permissible prospective relief because it sought only possession of the property from the defendant officials and was not an *in personam* action

to recover damages against the State. The relief the Foundation requests in the instant case, even if it is "possession" as against Mauro, can only be granted if the district court orders the State to relinquish its interest in the disputed property. Such relief would be the equivalent of recovering damages from the State.

Despite its contention that its § 1983 suit is only for declaratory and prospective injunctive relief against Mauro in his official capacity, the relief sought by the Foundation – no matter how its request for relief is phrased – would operate against the State. Hence, the State of Texas, not Mauro, is the real, substantial party in interest. We therefore conclude that the Foundation's § 1983 claim is barred by the Eleventh Amendment, and the district court did not err in determining that the court did not have the power to entertain the claim.

B. Disposition of the Fifth Amendment and § 1983 Claims

The Foundation also argues that the district court should have remanded its federal claims to state court. We disagree.

The district court properly concluded that it did not have subject matter jurisdiction over the Foundation's § 1983 claim. *See supra* Part III.A. The court also correctly determined that the Foundation's Fifth Amendment inverse condemnation claim brought directly against the State of Texas is also barred by the Eleventh Amendment. *See Alabama v. Pugh*, 438 U.S. 781, 782, 98 S.Ct. 3057, 3057-58, 57 L.Ed.2d 1114 (1978) (reaffirming the rule set forth in *Hans v. Louisiana*, 134 U.S. 1, 10 S.Ct. 504, 33 L.Ed.

842 (1890), that a citizen cannot sue a state in federal court, even if only prospective injunctive relief is being sought, without the state's consent).

The Foundation acknowledges on appeal that its state and federal claims were not "separate and independent" and that it had alleged only a "single underlying wrong" from these claims. It also recognizes that the Supreme Court's decision in *Carnegie-Mellon University v. Cohill*, 484 U.S. 343, 353-55 & n. 11, 108 S.Ct. 614, 620-22 & n. 11, 98 L.Ed.2d 720 (1988), makes it clear that the remand provision of 28 U.S.C. § 1441(c) does not apply in such a situation. Yet, the Foundation invites this court to determine that § 1441(c) is applicable in the instant case because "it makes no sense for a district court to possess discretion to remand all claims if the state and federal claims are " 'separate and independent,' " i.e., under § 1441(c), "but to have no such discretion if the claims are related." The Foundation thus invites us to recognize a new remand authority available to the district court. We decline the invitation and determine that the district court did not err by dismissing the Foundation's federal claims.[3]

C. Denial of Summary Judgment

Finally, the Foundation contends that the district court erred in denying its motion for partial summary

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[3] We express no opinion on the applicability of 28 U.S.C. § 1447(c) to the instant case. The Foundation has not argued or briefed this issue on appeal, *see* Fed.R.App.P. 28(a)(5), and in fact has asserted that "no statute expressly says that the Foundation's federal claims may be returned to state court."

judgment after the court had concluded that it lacked subject matter jurisdiction. We agree.

"Unless a federal court possesses subject matter jurisdiction over a dispute, . . . any order it makes (other than an order of dismissal or remand) is void." *Shirley v. Maxicare Texas, Inc.*, 921 F.2d 565, 568 (5th Cir. 1991). Hence, that portion of the district court's judgment denying the Foundation's motion for partial summary judgment should be vacated.

IV. CONCLUSION

For the foregoing reasons, we conclude that the district court did not err in dismissing the Foundation's § 1983 claim against Mauro and its Fifth Amendment claim against the State of Texas. However, the district court erred in denying the Foundation's motion for partial summary judgment. We therefore AFFIRM the district court's judgment of dismissal and VACATE that portion of the district court's judgment denying the Foundation's motion for partial summary judgment. Costs shall be borne by the Foundation.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

THE JOHN G. AND MARIE STELLA KENEDY MEMORIAL FOUNDATION	§	
v.	§	C.A. NO. C-90-36
GARRY MAURO, COMMISSIONER GENERAL LAND OFFICE, AND THE STATE OF TEXAS	§	

ORDER OF DISMISSAL

I.

There lies along the south Texas gulf coast, between Padre Island and the mainland, a long, slender, and shallow body of water known as the Laguna Madre. It opens to the north in Corpus Christi Bay and to the south in the Gulf of Mexico at Port Isabel, a distance of approximately 110 miles. On the Laguna's western shore, east and south of Sarita, Texas, is the Kenedy Ranch owned by the plaintiff, The John G. and Marie Stella Kenedy Memorial Foundation. The boundary between the land of the Foundation and that of the State of Texas is at issue, specifically a determination of the ownership to approximately 35,000 acres of mud flats (and at times and places submerged) lying along the western edge of the Laguna Madre and the eastern edge of the Kenedy Ranch.

Title is in dispute. The plaintiff claims its title to the disputed land from two original Spanish and Mexican land grants, La Bareta ("Big Barreta") and Las Motas de la

Barreta ("Little Barreta"). Relying on *Luttes v. Texas*, 159 Tex. 500, 324 S.W.2d 167 (1959), plaintiff's ultimate goal is the judicial establishment of the mean higher high tide line across these flats as the boundary between its private lands and the State's public property. Defendants Garry Mauro, Commissioner of the General Land Office, and the State of Texas also claim title to the disputed land, arguing that the land is regularly covered by the waters of the Laguna Madre and, as such, constitutes submerged land which belongs to the State. Mauro and the State also find some comfort in the language of *Luttes*. In addition, defendants vigorously rely on an earlier decision of the Southern District of Texas, Corpus Christi Division, and this Circuit, which uses as a boundary the mean high tide line. *Humble Oil & Refining Co. v. Sun Oil Co.*, 190 F.2d 191 (5th Cir. 1951) (affirming district court decision in relevant part). While it is the plaintiff's position that *Luttes* overrules *Humble v. Sun*, thus requiring a fresh look at the boundary issue, the State argues *Humble v. Sun's* facts, findings, and holding properly resolved the title issue even under a *Luttes* test.

The dispute is more than an academic desire to establish a boundary over mud flats. Plaintiff's complaint is that Mauro refuses to acknowledge plaintiff's claims and that he continues to lease the mud flats to oil and gas companies for exploration and production. Exploration has been undertaken and, for many years, production has been successfully established. Great wealth has been produced to the benefit of the State and a proportional loss to plaintiff. If the plaintiff can move its boundary to the east, then the plaintiff hopefully gains mineral wealth. If defendants can resist plaintiff's attempt to move the

established boundary and maintain the status quo, the State will continue to receive benefits derived from the production of oil and gas from the disputed land. Plaintiff does not seek a return from Texas of royalties or other monies received under these leases.

II.

On several occasions, plaintiff sought legislative consent to sue the State, but was always refused such consent. Consequently, plaintiff proceeded without consent and, on January 1, 1990, filed this suit in Texas state district court in Kenedy County against defendant Mauro in his official capacity as Commissioner of the General Land Office. Plaintiff complains that Mauro, acting under color of state law, has violated plaintiff's Fifth and Fourteenth Amendment rights under the United States Constitution, 42 U.S.C. § 1983, as well as other state law rights. Plaintiff wants this Court to declare Mauro's continued leasing of the property to producers of oil and gas as violative of its property rights and to obtain this Court's injunction that Mauro cease his leasing activities, change existing state maps, and prepare another public map properly showing a boundary line between their properties as found by the Court.

Defendants removed this lawsuit to this Court on the basis of federal question jurisdiction. On March 4, 1991, the plaintiff filed its first amended complaint asserting additional claims, including a claim against the State for deprivation of property without just compensation under the Fifth Amendment to the United States Constitution.

Defendants have moved for summary judgment, relying on the Eleventh Amendment[1] to bar this suit. U.S. Const. amend. XI. Defendants also rely on the affirmative defenses of res judicata, collateral estoppel, stare decisis, laches, and comity to maintain the boundary established in *Humble v. Sun*. Plaintiff has also moved for partial summary judgment, seeking a finding from this Court that the disputed land is located above the mean higher high tide line.

This Court conducted a hearing on the parties' cross-motions for summary judgment. At the hearing, the plaintiff conceded that, absent the Sate's consent to suit, *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 104 S.Ct. 900 (1984), bars this Court from adjudicating either the state law claim asserted against Commissioner Mauro or the state law takings claim against the State. The plaintiff also conceded that *Alabama v. Pugh*, 438 U.S. 781, 98 S.Ct. 3057 (1978) (per curiam), which bars suit against the state in its own name, prevents this Court from hearing the federal constitutional taking claim asserted against the State. *See also, Brennan v. Stewart*, 834 F.2d 1248, 1253 (5th Cir. 1988) (citing *Alabama v. Pugh* for continuing vitality of Eleventh Amendment bar to suits directly against a state).

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[1] The Eleventh Amendment reads as follows: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens of Subjects of any Foreign State." The Amendment has been interpreted by the Supreme Court to bar suits in federal court by citizens of the defendant state. *Hans v. Louisiana*, 134 U.S. 1 (1890).

Accordingly, plaintiff's state court claim against defendant Mauro, alleging that Mauro's exercise of dominion and control over the disputed land constitutes a cloud on plaintiff's title to the land, is dismissed. Similarly, plaintiff's claims against the State of Texas, arising under state or federal law, are barred by the State's assertion of its Eleventh Amendment immunity and are therefore dismissed. The Court also denies plaintiff's motion of partial summary judgment, finding that *Humble v. Sun* satisfies the defendants' need to establish issues of fact as to the proper location of the boundary between the Kenedy Ranch and the State's public lands.

III.

Jurisdiction of this Court depends entirely on whether plaintiff's § 1983 claim can survive defendants' Eleventh Amendment immunity. Plaintiff argues that its action is not against the State but only against Mauro in his official capacity and, as such, is not barred by the Eleventh Amendment, based on the Supreme Court's holding in *Ex Parte Young*, 209 U.S. 123, 28 S.Ct. 441 (1908). Specifically, plaintiff complains that Mauro, acting under the color of state law, has deprived plaintiff of its property in violation of plaintiff's Fifth and Fourteenth Amendment rights, through the following actions or inactions of Mauro:

> 1. Mauro, who is conferred by state law with the responsibility for and control of state land, Tex. Nat. Res. Code Ann. §§ 31.051, 31.052, and 31.063 (Vernon 1978), possesses the authority to determine for the State the boundaries between privately-owned lands and state-

owned submerged lands. Plaintiff has provided updated surveys of the disputed land to Mauro, which surveys demonstrate that the disputed lands lie above the boundary defined by the Texas Supreme Court in *Luttes*; however, Mauro, acting under color of state law, refuses to recognize or identify the proper location of the boundary between plaintiff's property and the State-owned lands.

2. Mauro, despite the authority to do so, fails to conduct his own survey of the disputed land to refute plaintiff's data.

3. Mauro, acting under color of state law, continues to show the disputed land on official state maps as being submerged lease tracts that are available for lease from the State.

4. Under color of state law, Mauro continues to negotiate and execute oil and gas leases to the property for the benefit of the State despite plaintiff's claimed ownership in the land.

5. Mauro, acting under color of state law, has deprived and continues to deprive plaintiff of its property without due process by repeatedly opposing plaintiff's attempts to obtain legislative consent to sue the State.

Plaintiff's First Amended Complaint, D.E. #35, at 2-8. Plaintiff argues that its only recourse to protect its constitutional and statutory rights is to bring this § 1983 action against Mauro in his capacity as commissioner of the General Land Office. Through this action, plaintiff requests that this Court determine and declare that the disputed land is above the mean higher high water and, as such, that plaintiff is the owner of the disputed land.

Further, plaintiff requests that Mauro be permanently enjoined from exercising dominion and control over the disputed land and from leasing any portion of the disputed land for oil and gas development or surface use, and be directed to amend all official "state lease tract" maps and other official maps and documents to depict the disputed land as privately-owned land and not as state-owned submerged land. Finally, plaintiff seeks an award of attorney's fee pursuant to 42 U.S.C. § 1988.

In order to rule for plaintiff on its § 1983 claims, this Court would have to find that plaintiff's claims against Mauro are violations of federal law instead of violations of state law. For the reasons stated herein, the Court finds that the acts complained of by plaintiff do not establish violations under federal law but are in fact claims against Mauro as a state official to vindicate state-created rights. As the plaintiff's claims do not rise to the level of a federal constitutional claim, the Court finds that it does not have jurisdiction over this case and dismisses plaintiff's claims.

IV.

In evaluating plaintiff's claims against Mauro and the ultimate relief requested, that title to the property be declared in plaintiff's name, this Court holds that the true nature of this action is a title dispute. Plaintiff claims ownership to the disputed land through the original Big and Little Barretta land grants which identify the Laguna Madre as the eastern boundary of the grants. The plaintiff

argues that since this Court's holding in *Humble v. Sun*,[2] wherein title to portions of the disputed land was effectively adjudicated to the State,[3] there has been a change in both the physical characteristics of the disputed land and in the state law interpreting such physical boundaries by virtue of the Texas Supreme Court's holding in *Luttes v. State*, 159 Tex. 500, 324 S.W.2d 167 (1959). The plaintiff has provided the affidavits of two expert surveyors who testify that the disputed land is not submerged but lies above any proper value of mean higher high tide. As such, the plaintiff argues that the disputed land, by accretion, belongs to the plaintiff under the original land grants.

Defendants have claimed title to the property for over the past century on grounds that the land is commonly submerged by the waters of the Laguna Madre and that submerged lands belong to the State of Texas. Further, defendants argue that the plaintiff's predecessors in interest previously challenged the State's right to lease the property in *Humble v. Sun*, and that this Court held that the State's lessees were the proper lessees of the property through the State's ownership of the disputed

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[2] *Sun Oil Co. v. Humble Oil & Refining Co.*, 88 F. Supp. 658 (S.D. Tex. 1950), *modified by* 190 F.2d 191 (5th Cir. 1951).

[3] The Fifth Circuit affirmed the district court's holding in relevant part, but reversed that part of the holding permitting the intervention of the State as a party; however, the Fifth Circuit held that the lessees of the State were properly on the land.

land. Finally, defendants refute that any substantial physical changes have occurred to the disputed land's boundary which would necessitate a redefining of the boundary under *Luttes*.

If this Court were to find that *Luttes* represents a change in the law and that accretion of land by alluvion or dereliction had occurred, thus moving the Kenedy Ranch boundary to the east, then the Court could also find that the State's claim to the land was no longer valid and that Mauro's continued leasing of the property constitutes a trespass and a taking. Unquestionably, the ultimate issue to be decided is dependent on state law. Mauro's actions, which form the basis of plaintiff's § 1983 claim, are discretionary actions of an elected official acting under a state statute not challenged as unconstitutional; as such, plaintiff fails to state a violation of federal law to overcome the Eleventh Amendment immunity. At best, it is an allegation of a tortious taking.

Plaintiff presents its § 1983 claim against Mauro as one against a state official for violation of federal law. The plaintiff relies on the Supreme Court holding in *Ex Parte Young*, which provides that a suit challenging the constitutionality of a state official's action is not one against the State and is, therefore, not barred by the Eleventh Amendment. *Ex Parte Young*, 209 U.S. 123, 28 S. Ct. 441 (1908). In effect, in an attempt to create a constitutional violation, plaintiff is arguing that when a state official, acting under color of title, deprives an individual of an alleged property interest, the deprivation rises to that of a constitutional violation.

This Court cannot agree with such a conclusion as suggested by plaintiff in light of the Supreme Court's holding in *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 106, 104 S. Ct. 900, 911 (1984) *Pennhurst II*. In *Pennhurst II*, the Supreme Court addressed the issue of whether a federal district court, over the objection of a nonconsenting state, could hear a pendent state law claim wherein the complaining party alleged violations of state law by state officials. The Court concluded that a federal suit against state officials on the basis of state law contravenes the Eleventh Amendment when the relief sought and ordered has an impact directly on the state itself. *Pennhurst II*, 465 U.S. at 117, 104 S. Ct. 917 (1984). The Court cautioned that when a suit is brought only against state officials, a question arises as to whether that suit is a suit against the state itself. If the action is in fact one against the state, the Eleventh Amendment bars the suit against the state officials because the state is the real, substantial party in interest. The Court commented that the purposes of the *Ex Parte Young* exception to the Eleventh Amendment bar was limited to Fourteenth Amendment claims alleging violations of the "supreme law of the land," that is, federal law violations. The Court went on to comment that:

> A federal court's grant of relief against state officials on the basis of state law, whether prospective or retroactive, does not vindicate the supreme authority of federal law. On the contrary, it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law. Such a result conflicts directly with the principles of federalism that

> underlie the Eleventh Amendment. We conclude that *Young* and *Edelman* are inapplicable in a suit against state officials on the basis of state law.

Pennhurst II, 465 U.S. at 105-106, 104 S. Ct. at 910-911.

Plaintiff's argument, that Mauro's violations of state law creates a constitutional violation of plaintiff's rights, mirrors the reasoning of the dissenting opinion of Justice Stevens in *Pennhurst II*. Under that view, an allegation that official conduct is contrary to a state statute would suffice to override the state's protection from injunctive relief under the Eleventh Amendment because such conduct is *ultra vires* by exceeding the official's authority. The majority, however, countered this argument and suits such as this one by stating that Justice Stevens' opinion " . . . rests on fiction, is wrong on the law, ... " *Id.* Thus, a mere error of law by state officers acting in their official capacity will not suffice to override the sovereign immunity of the State where the relief requested is effectively against the State. *Pennhurst II*, 465 U.S. at 106-117, 104 S. Ct. at 911-917.

Plaintiff has not challenged as unconstitutional the state statute which authorizes Mauro, as commissioner of the General Land Office, to perform his duties as Commissioner, which include the leasing of property and defending title. In fact, the statute expressly authorizes Mauro to "execute and perform all acts and other things relating to public land of the state or rights of individuals in public land which is required by law." Tex. Nat. Res. Code Ann. § 31.051 (Vernon 1978). It is evident that Mauro is acting within his statutory authority and on reasonable reliance of the State's title to the disputed

land, unchallenged for years and when challenged, affirmed in *Humble v. Sun.*

In addition to *Ex Parte Young,* plaintiff relies on three additional Supreme Court cases, *Tindal v. Wesley,* 167 U.S. 204, 17 S. Ct. 770 (1897), *United States v. Lee,* 106 U.S. 196, 1 S. Ct. 2440 (1882), and a more recent case, *Florida Dept. of State v. Treasure Salvors, Inc.,* 458 U.S. 670, 102 S. Ct. 3304 (1982), to support its position that Mauro's actions constitute a violation of federal law. Each of these cases can be distinguished. In *Treasure Salvors,* the plaintiff brought an admiralty action in federal court against a Spanish galleon, which it had recovered from the waters off the Florida coast, seeking a declaration of title to the galleon and its contents. The United States intervened in the action claiming title to the galleon. Prior to this admiralty action, in an unrelated case, *United States v. Florida,* 420 U.S. 531, 95 S. Ct. 1162 (1975), title to the submerged lands where the galleon was found had been adjudicated to be in the United States. After finding title to the galleon and its contents to be in Treasure Salvors, Inc., the federal court issued a warrant of arrest to obtain custody and jurisdiction over artifacts from the galleon in the possession of Florida state officials. Florida filed a motion to quash the warrant, which motion was denied. The federal court then issued an order for Florida to show cause why the state officials should not deliver the artifacts into the federal court's custody. Florida responded, *inter alia,* that the Eleventh Amendment was a bar to the federal court's jurisdiction. The Supreme Court in its plurality opinion held that the Eleventh Amendment was no bar to the federal court's warrant because the Florida

officials had no "colorable basis on which to retain possession of the artifacts." 458 U.S. at 682, 102 S. Ct. at 3313. Thus, the Court found that, since the Supreme Court had already determined that Florida had no claim to the artifacts, the State of Florida had no authority to claim the right to continued possession of the artifacts.

Although *Treasure Salvors* is a plurality opinion, the plurality and concurring/dissenting opinions recognize that the issue of a colorable claim is relevant to a decision challenging the unconstitutionality of a discretionary act. In effect, to establish an *Ex Parte Young* exception to Eleventh Amendment immunity, a claimant must establish that a state official's actions are *ultra vires* or unconstitutional and not merely a tortious interference with a claimant's property rights. *Treasure Salvors,* 458 U.S. at 690, 102 S. Ct. at 3304. The State of Texas certainly has, at a minimum, a "colorable basis" for claiming title to the disputed land. This Court, as well as the Fifth Circuit, considered the State of Texas to be the owner of the disputed land in *Humble v. Sun*. As the trial court noted in that case, the Big and Little Barreta grants contained acreage in excess of that called for in the grants even when limited to the surveys or lines contended by Sun and the State of Texas. As such, plaintiff's predecessor was estopped to claim the portion of the disputed land adjacent to the Big Baretta because prior title holders of the Big Baretta had accepted the boundary delineated in the patent survey conducted in 1905-06. The maps of both the state and federal governments have depicted this area as the Laguna Madre and, hence, as state-owned submerged lands, for over a century. Any argument that the

State has no "colorable basis" for claiming title is without merit.

The other cases relied on by plaintiff, *Ex Parte Young* (official acting ultra vires because state statute held unconstitutional), *Tindal v. Wesley* (taking unconstitutional because plaintiff's right to land already determined by state court), *United States v. Lee* (taking unconstitutional as property determined to be plaintiff's under state law), and *Treasure Salvors* (official had no colorable title to property), do not assist plaintiff. Plaintiff has *not* obtained a judgment declaring it the owner of the disputed land as did the plaintiffs in *Tindal* and *Lee*, nor has plaintiff shown that Mauro is acting without any colorable claim to the property, as in *Ex Parte Young* and *Treasure Salvors*. Although the plaintiff has brought its § 1983 claim against Mauro as a state official, in actuality the suit is against the State itself. A suit against state officials that is in fact a suit against a state is barred by the Eleventh Amendment regardless of whether it seeks damages or injunctive relief. *Pennhurst II*, 465 U.S. at 102, 104 S. Ct. at 909.

Based on the foregoing, the Court finds that plaintiff has failed to demonstrate a violation of federal law. In effect, plaintiff's § 1983 claim is an action against a state official for violation of state law and the relief requested is against the State, not Mauro. As such, under the Supreme Court's holding in *Pennhurst II*, plaintiff cannot maintain its claim in this Court, as the Eleventh Amendment clearly bars such a claim.

The Court also notes that despite the State's refusal to consent to suit, plaintiff is not without other relief.

Plaintiff is not foreclosed from attempting to establish its title superior to that of the State in a state court suit by challenging the right of any third party entering under the authority of the state's claim of ownership.

Accordingly, this case is dismissed for lack of jurisdiction.

ORDERED this 30 day of Sept, 1992.

H.W. HEAD, JR.
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

THE JOHN G. AND MARIE STELLA KENEDY MEMORIAL FOUNDATION	§	
v.	§	C.A. NO. C-90-36
GARRY MAURO, COMMISSIONER OF THE GENERAL LAND OFFICE, AND THE STATE OF TEXAS	§	

FINAL JUDGMENT

Final judgment is rendered dismissing plaintiff's case for lack of jurisdiction. Costs are awarded to defendants.

ORDERED this 30 day of Sept, 1992.

H.W. HEAD, JR.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

THE JOHN G. AND MARIE STELLA KENEDY MEMORIAL FOUNDATION	§	
	§	C.A. NO. C-90-36
v.	§	
GARRY MAURO, COMMISSIONER OF THE GENERAL LAND OFFICE, AND THE STATE OF TEXAS	§	

AMENDED FINAL JUDGMENT

The Final Judgment dated September 30, 1992 is withdrawn, and the following is the Judgment of the Court:

It is the Judgment of this Court that plaintiff's claims asserted against Commissioner Mauro and the State of Texas pursuant to 42 U.S.C. § 1983 and the Fifth and Fourteenth Amendments are barred by the Eleventh Amendment and are dismissed for lack of jurisdiction. The Court remands all other claims to the 105th Judicial District Court, Kenedy County, Texas for its decision. Costs are awarded to defendants.

ORDERED this 2 day of Oct, 1992.

H.W. HEAD, JR
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

THE JOHN G. AND MARIE STELLA KENEDY MEMORIAL FOUNDATION	§	
v.	§	C.A. NO. C-90-36
GARRY MAURO, COMMISSIONER, GENERAL LAND OFFICE, AND THE STATE OF TEXAS	§	

ORDER MODIFYING ORDER OF DISMISSAL

On September 30, 1992, when this Court issued its Order of Dismissal, it overlooked the removed status of this litigation. Rather than dismiss for lack of jurisdiction all of plaintiff's federal and state causes of action against defendants Garry Mauro, Commissioner of the General Land Office, and the State of Texas, it is the better judgment and the intention of the Court to dismiss only those claims of plaintiff that are barred by the Eleventh Amendment of the United States Constitution. These are plaintiff's claims asserted against Commissioner Mauro and the State of Texas pursuant to 42 U.S.C. § 1983 and the Fifth and Fourteenth Amendments.

All other claims the Court remands to the 105th Judicial District Court, Kenedy County, Texas for its decision.

ORDERED this 2 day of Oct, 1992.

H.W. HEAD, JR
UNITED STATES
DISTRICT JUDGE